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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

KASSIM ABDOOL et al.,

Plaintiffs,

v.

MICHAEL JOSEPH JACKSON,

Defendant and Respondent;

NBC UNIVERSAL, INC., et al.,

Movants and Appellants.

2d Civil No. B178873
(Super. Ct. No. SM89344)
(Santa Barbara County)

NBC Universal and several other media outlets appeal an order denying a motion to unseal documents in a civil case concluded in 1997. We affirm.

FACTS

Appellants NBC Universal, Inc., et al. (collectively "NBC") filed a motion to unseal judicial records in a civil employment action filed by former employees against celebrity Michael Jackson in 1995.

On June 8, 1995, the trial court issued a protective order sealing most of the records in the case. The case proceeded to a jury trial and concluded in Jackson's favor in 1997.

On March 18, 2004, more than eight years after the protective order was issued, appellant NBC filed a motion to unseal the records. The plaintiffs did not oppose the motion. Jackson agreed to unseal most of the court records, except for 15 documents that he requested remain under seal.

On July 28, 2004, the trial court ordered that 25 documents were to remain under seal. These documents included the judge's and research staff's notes. All remaining documents were unsealed. The trial court made the following findings:

"[T]hat, with regard to the specific documents listed below, there exists an overriding interest that overcomes the right of public access to said records based on the fair trial rights of Michael J. Jackson, Defendant in Superior Court Case No. 1133603, the orders of Judge Melville presiding over said case which is pending trial, . . . the privacy rights of witnesses and other third parties [¶] [T]hat there is a substantial probability that the overriding interests set forth above would be prejudiced if the records were not sealed; [and] [¶] [T]hat the proposed sealing of the specific records is narrowly tailored and that no less restrictive means exist to protect the overriding interests set forth above."

CONTENTIONS

NBC contends the order sealing the records violates the First Amendment to the United States Constitution and does not comply with California Rules of Court,¹ rule 243.1,² or the standards articulated in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178 (*NBC Subsidiary*).

¹ All rule references are to the California Rules of Court.

² Rule 243.1, "Sealed Records," provides in pertinent part:

"(d) [Express factual findings required to seal records] The court may order that a record be filed under seal only if it expressly finds facts that establish:

"(1) There exists an overriding interest that overcomes the right of public access to the record;

"(2) The overriding interest supports sealing the record;

"(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

"(4) The proposed sealing is narrowly tailored; and

"(5) No less restrictive means exist to achieve the overriding interest.

"(e) [Content and scope of the order]

"(1) An order sealing the record must (i) specifically set forth the facts that support the findings and (ii) direct the sealing of only those documents and pages, or, if reasonably

DISCUSSION

Standard of Review

The parties disagree regarding the standard of review on appeal. Jackson asserts the proper standard of review is abuse of discretion, relying on *Providian Credit Card Cases* (2002) 96 Cal.App.4th 292. NBC argues the standard of review is de novo, citing *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791. *Ghirardo*, however, involves neither the First Amendment nor the relevant court rules.

Providian construed rules 243.1 and 243.2 and concluded, "these rules vest a trial court with a considerable amount of discretion in deciding whether to seal or unseal portions of a judicial record." (*Providian Credit Card Cases*, *supra*, 96 Cal.App.4th at p. 295.)

In *People v. Jackson* (2005) 128 Cal.App.4th 1009, we held that de novo is the proper standard in reviewing a trial court's order to seal records where witness credibility is not an issue.³ In such circumstances, independent review is the equivalent of de novo review. The appellate court in *Providian* reviewed an order to unseal documents relating to trade secrets. Here, the unsealing of records could have had profound implications on the then-pending criminal action against Michael Jackson. Therefore we conclude, as we did in *Jackson*, the proper appellate standard of review here is independent review.

General Principles

"[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it [is] a trying task to choose between them." (*Bridges v. California* (1941) 314 U.S. 252, 260.) On the one hand, the First Amendment recognizes "a general right to inspect and copy public records and documents, including judicial documents and

practicable, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file."

³ We take judicial notice of the record in *People v. Jackson*, *supra*, 128 Cal.App.4th 1009.

records.'" (*United States v. Inzunza* (S.D.Cal. 2004) 303 F.Supp.2d 1041,1044, quoting *Nixon v. Warner Communications, Inc.* (1978) 435 U.S. 589, 597.) On the other hand, a trial judge has "an affirmative duty to control adverse publicity to protect the right of an accused to a fair trial." (*In re Willon* (1996) 47 Cal.App.4th 1080, 1093, citing *Sheppard v. Maxwell* (1966) 384 U.S. 333.)

In the performance of that duty, a trial judge may remove from public scrutiny a record containing data or material that, if publicized prior to trial, could result in publicity so inherently prejudicial as to endanger a fair trial. (*Craemer v. Superior Court* (1968) 265 Cal.App.2d 216, 225; see also *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1075 ["Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right"].) Nonetheless, "pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." (*Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539, 565.)

Our Supreme Court set forth the test to be used in balancing these two precious rights. In *NBC Subsidiary, supra*, 20 Cal.4th 1178, the court exhaustively reviewed United States Supreme Court and Federal Circuit Court of Appeals opinions that speak to the issue of public access in criminal and civil cases. The court concluded that most judicial proceedings and records are subject to a presumption of openness. When the presumption applies, the public has a qualified right of access. That right may be denied only if the court, after notice and hearing, expressly finds: "(i) there exists an overriding . . . interest supporting closure and/or sealing; (ii) there is a substantial probability . . . that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest." (*Id.* at p. 1218, fns. omitted.) These principles were codified in rule 243.1(d).

We have reviewed the materials sealed by the trial court and the court's findings under the independent review standard. The trial court was hampered in its

ability to make the specific findings required by *NBC Subsidiary* because of its limited access to the record in Jackson's criminal case. But under the rules of appellate review, we review the trial court's order, not its reasoning. (*Fieldstone Co. v. Briggs Plumbing Products, Inc.* (1997) 54 Cal.App.4th 357, 372.) Under the independent judgment standard, we engage in the same review of the facts and law as the trial court. Therefore, a deficiency, if any, in the trial court's findings does not affect our review. (See, e.g., *Harlow v. Carleson* (1976) 16 Cal.3d 731, 738 [appellate court's power to affirm, modify or direct the entry of judgment is liberally construed to permit a cause to be disposed of without further proceedings].)

Responses to Interrogatories and Settlement Statements

Most court records are subject to a presumption of openness. However, the public has no right of access to discovery materials. (Rule 243.1(a)(2); see also *Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, 1242, fn. 9, and cases cited.) Thus, the court did not err in sealing plaintiffs' response to specially prepared interrogatories.

Nor does the public have a right of access to settlement conference statements. Although not expressly excluded by rule 243.1(a)(2), these documents are not subject to the presumption of openness because they are not a part of the trial. (See *NBC Subsidiary*, *supra*, 20 Cal.4th at p. 1209, fn. 25 ["The presumption of access does not apply until the documents or records of each proceedings are filed with the court or are used at a judicial proceeding"]; see also *Jessup v. Luther* (7th Cir. 2002) 277 F.3d 926, 928-929 [settlement agreements are private documents subject to a right of access only when filed in the court record]; *U.S. v. Glens Falls Newspapers, Inc.* (2d Cir. 1998) 160 F.3d 853, 857 [no presumptive right of access to settlement discussions and documents]; *U.S. v. El-Sayegh* (D.C. Cir. 1997) 131 F.3d 158, 161-163 [no First Amendment or common law right of access to documents that played no role in a judicial decision]; *Pansy v. Borough of Stroudsburg* (3d Cir. 1994) 23 F.3d 772, 781 [when a settlement agreement is not filed with, interpreted by, or enforced by a court, it is not a judicial record presumed to be accessible].)

Summary Judgment Materials and Other Documents

The other records the court ordered remain sealed include: pleadings related to defendant's ex parte application to file motion for protective order and related pleadings under seal, exhibit K to an ex parte application for order to show cause regarding contempt, plaintiffs' motion for summary judgment and/or summary adjudication, plaintiffs' motion in limine, plaintiffs' trial brief, exhibit J to defendant's motion in limine, ex parte application for modification of protective order, and order modifying protective order. These records are subject to the presumption of openness. Public access may be denied only in limited circumstances. (See, e.g., *Foltz v. State Farm Mut. Auto. Ins. Co.* (9th Cir. 2003) 331 F.3d 1122, 1135 [summary judgment documents subject to public's right of access because "'summary judgment adjudicates substantive rights and serves as a substitute for trial'"].)

NBC Subsidiary

As to the first prong under *NBC Subsidiary*, an overriding interest supports the trial court's order. It based its order to seal on Jackson's right to a fair trial, the privacy rights of witnesses and third parties, and the protective order issued in the Jackson criminal case. NBC argues none of these rights are sufficient to override the public's right of access to the summary judgment and other materials filed in the civil case. We disagree.

The privacy interests of minors can override the public's qualified right of access. *NBC Subsidiary* acknowledged that "protecting minor victims of sex crimes from the trauma and embarrassment of public scrutiny" could justify limiting public access to court documents. (*NBC Subsidiary, supra*, 20 Cal.4th at pp. 1206-1207, 1222; see also *Doe v. Blue Cross & Blue Shield United of Wisconsin* (7th Cir. 1997) 112 F.3d 869, 872 [appropriate for court to seal psychiatric records that though pertinent to the suit would have been "highly embarrassing to the average person"].)

Jackson's right to a fair trial also would be prejudiced by public disclosure of the information in the sealed documents. At the time of the motion to unseal, Jackson's criminal case was pending. The case involved allegations of child molestation

and conspiracy to harass and intimidate third parties allegedly having knowledge of molestation. It is immediately apparent upon review of the sealed documents that the prior civil case and the criminal case involve similar allegations against Jackson.

Accusations of child molestation are highly prejudicial. (*Nebraska Press Assn. v. Stuart*, *supra*, 427 U.S. at p. 554 ["The capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity"]; see also *Cromer v. Superior Court* (1980) 109 Cal.App.3d 728, 734 [the type of crime alleged "would certainly outrage the sensibilities of persons, including prospective jurors, who might learn of them before the trial; they would not be soon forgotten. And were the evidence to be ruled inadmissible at the trial, we opine that it would be a rare juror who, having heard of it, could nevertheless disregard it"].)

Pretrial proceedings in the criminal case generated a blizzard of publicity. Any new development in this case led to intense media scrutiny. News sources from around the world--newspapers, magazines, radio, television and the Internet--were saturated with information (or disinformation) about the case. Unless one was a hermit, such information was not easily avoided. It was highly unlikely that potential jurors would not be influenced by exposure to the information NBC sought.

NBC argues that the trial court placed undue emphasis on Jackson's celebrity status and that this factor cannot be used to justify sealing. NBC relies on *ABC, Inc. v. Stewart* (2d Cir. 2004) 360 F.3d 90. Both Jackson and Martha Stewart are well known to the general public and both cases involve allegations of criminal conduct. But Stewart committed a white-collar crime, and Jackson was alleged to have committed child molestation. The *Stewart* court itself distinguished its facts from those in cases where denial of public access was appropriate because they involved "emotionally charged" and "socially sensitive" issues. (*Id.* at p. 104.) One of the most loathsome acts a person may commit is child molestation. Revealing the details of such a crime is extremely prejudicial.

Here, it is the combination of celebrity status and the type of crimes alleged that justifies sealing. The disclosure of the accusations made in the civil case prior to

selection of a jury in the criminal case could only lead to a public condemnation of the defendant before he can defend himself in court. (See, e.g., *Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 209 [proper to seal grand jury transcript when material in transcript was highly prejudicial and of questionable admissibility and pretrial disclosure would endanger the defendant's right to a fair trial by making it difficult to impanel an unbiased jury at the time of the sealing order].) As one pundit said after Judge Melville determined that evidence of prior uncharged acts could be used at trial, "This is no longer about one boy's credibility. It's about whether Michael Jackson is a serial child molester." (Comments of Professor Laurie Levenson appearing in the Los Angeles Daily Journal, *Jury Will Hear Old Charges in Jackson Case* (Mar. 29, 2005), p. 5.)

The similarity of the allegations would only serve to stimulate the public's appetite for the case, an appetite the media would surely satisfy. Release of the materials would undoubtedly be followed by their widespread dissemination and dissection in every sort of media medium, including daily television with parades of "experts" endlessly commenting about likely prosecution and defense strategies, opining about the strengths, weaknesses and admissibility of the various tidbits disclosed by the materials, and venturing predictions about the probable outcome of the trial. (See *Crowe v. County of San Diego* (S.D.Cal. 2002) 210 F.Supp.2d 1189, 1197 [public access to information would "'create a news event, an opportunity for 'commentators' to speculate and to add to the volume of otherwise inadmissible material presented to potential jurors in this case. . . . [A criminal defendant] is entitled by the fundamental rules, which govern this society, to have a trial in this community before an impartial jury, which fairly resolves the issues of guilt and possible penalty based on evidence that has met the test of reliability in a court of law'"].)

NBC contends the trial court erred in relying on Judge Melville's protective order in the criminal case. The trial court's duty to protect a defendant's right to a fair trial includes the power to prevent the public dissemination of inaccurate information or inadmissible evidence. (See *In re Willon, supra*, 47 Cal.App.4th at p. 1094 [the trial court is "clearly obligate[d]" to undertake measures to control publicity when, under the

totality of the circumstances, the court finds that such exposure is reasonably likely to impair the criminal defendant's right to a fair trial].) Under the circumstances here, the trial judge properly considered Judge Melville's protective order.

The crimes alleged in the sealed documents are pertinent to the criminal trial and their admissibility is subject to the trial court's discretion under Evidence Code section 1108. (See *People v. Falsetta* (1999) 21 Cal.4th 903 [allowing evidence of prior uncharged sex crimes as propensity evidence].) Releasing the information would likely affect Judge Melville's ability and discretion to control the admission of such evidence in the criminal case. (Pen. Code, § 1044.)

The second prong of the *NBC Subsidiary* test requires the court to find that there is a substantial probability that the interests will be prejudiced absent closure and/or sealing. "We enter into this analysis keeping in mind that assessing the likely effect of an event by its nature calls for speculation." (*In re Willon, supra*, 47 Cal.App.4th at p. 1100; *People v. Cooper* (1991) 53 Cal.3d 771, 838-839; see also *Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at p. 563 [finding that publicity could prejudice defendant's right to a fair trial was necessarily speculative, since it dealt with "factors unknown and unknowable"].)

In re Willon states that in assessing whether there is a substantial probability that pretrial publicity would impair a defendant's right to a fair trial, relevant factors include: (1) the nature and extent of the publicity, (2) the amount of information already in the public domain, (3) the existence of prejudicial information not yet released to the public, (4) the size of the county from which prospective jurors will be drawn, and (5) whether potential voir dire or other measures could eliminate any prejudice caused by the publicity. (*In re Willon, supra*, 47 Cal.App.4th at p. 1099.)

The first and second criteria are easily met. The nature and extent of publicity and the amount of information in the public domain were overwhelming. The ordinary viewer or listener or reader had been subject to a daily media barrage of details about the case in the several months preceding the trial.

Most, if not all, of the allegations made in the civil case were made public during a six-month jury trial. Generally, once information is in the public arena, there is no justification for sealing. (*Hurvitz v. Hoefflin, supra*, 84 Cal.App.4th at p. 1235; *KNSD Channels 7/39 v. Superior Court* (1998) 63 Cal.App.4th 1200, 1204.) But, where, as here, the information was in the public domain several years ago and has likely faded from the public's consciousness, the rule does not necessarily apply. (See, e.g., *Gentile v. State Bar of Nevada, supra*, 501 U.S. at p. 1044 ["exposure to the same statement six months prior to trial would not result in prejudice, the content fading from memory long before the trial date"]; *Murphy v. Florida* (1975) 421 U.S. 794, 802 [the passage of time may work to erase highly inflammable publicity in a first trial].) Here, sufficient time has passed, memories have faded, and sealing is justified to prevent prejudice.

The judicial district from which the jury will be selected has approximately 200,000 people. A substantially lesser number are eligible for jury duty and available from which to choose an unbiased jury pool.

The third prong requires that the proposed closure and/or sealing be narrowly tailored. NBC does not suggest, and we cannot devise, a workable alternative. As stated above, the documents NBC seeks to have unsealed contain unproved allegations similar to those in the criminal case. We have reviewed the sealed documents to determine whether it is feasible to release redacted versions. We conclude that this alternative is not feasible because "dissecting the transcripts to parse out individual facts for publication is impossible. Benign information is inextricably intertwined with objectionable information." (*Crowe v. County of San Diego, supra*, 210 F.Supp.2d at p. 1201.)

The fourth prong requires that there be no less restrictive means of achieving the overriding interest. "[T]he burden of demonstrating reasonable alternatives to closure rests with the press." (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1218, fn. 40.) NBC correctly points out that the court in *NBC Subsidiary* said that jury admonitions and instructions are usually sufficient to keep jurors from considering inadmissible evidence and that it is a presumptively reasonable alternative to closure. But the court also said:

"In a given case, the presumption that [jury] admonitions and instructions are adequate may be rebutted by the exceptionally prejudicial nature of evidence to be received . . . and the potential intensity of media coverage." (*Id.* at p. 1224.) This is such a case. The general public views child molestation as a particularly heinous crime. We believe that any potential juror could not help but be influenced by pretrial disclosure of similar acts.

We do not take lightly the public's right of access to court proceedings and documents and the interests served by public access. We have considered and balanced all relevant factors within the framework of controlling precedents. Under the totality of the circumstances existing at the time Judge Melville issued the sealing order, sealing was necessary to avoid impairing Jackson's right to a fair trial, the privacy rights of minors and witnesses, and the judge's right to control the conduct of the case before him.

We affirm. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Zel Canter, Judge

Superior Court County of Santa Barbara

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